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ALERT

Court Finds No Jurisdiction Over Claims Concerning Cryptocurrency

By Stephen D. Palley and Daniel J. Healy

How much power do U.S. courts have over companies that engage in offshore cryptocurrency transactions, including token sales (also known as initial coin offerings, or ICOs)? An April 30, 2018, opinion from a New York federal court illustrates the limitations of this power over non-U.S. offerings.

In *Alibaba Group Holding v Alibabacoin Foundation*, 2019 U.S. Dist. LEXIS 72282 (S.D.N.Y. 2018), plaintiff (Alibaba Group) — the well-known online retailer — sued the Alibabacoin Foundation and related companies alleging trademark infringement, false advertising, false designation of origin and trademark dilution. Alibaba Group alleged that the defendants had infringed its trademark and intellectual property rights, including because the foundation created Alibabacoin (ABBC), sold it in two ICOs, and was in the midst of holding a third ICO. Alibaba Group was upset about consumers potentially thinking it might have sanctioned the ICOs and was the source of the ABBC cryptocurrency.

The court initially issued a temporary restraining order but refused to issue a preliminary injunction because it found that the plaintiff had not established personal jurisdiction over the defendant. According to the court, Alibaba Group is a Cayman corporation with a principal place of business in China. ABBC's corporate location and citizenship is not mentioned in the opinion.

Although ABBC raised multiple jurisdictional grounds, the court found subject matter jurisdiction under the Lanham Act. It shrugged off the argument stating that because no tokens had been sold yet on exchanges, there was no "use in commerce" of goods bearing the ALIBABA mark.

The personal jurisdiction argument is where things got more interesting. The Lanham Act, while a federal statute, does not create personal jurisdiction. Thus, constitutional and state law requirements must be met.

ABBC claimed that the Alibaba Group could not establish, and therefore trigger long-arm jurisdiction, that ABBC had conducted business in New York. Alibaba Group argued that the fact that ABBC's "highly interactive website" was available to New York residents, demonstrated that it had been used to effect commerce in New York. The court disagreed that it was sufficient "because Alibaba [Group] has not established

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a reasonable probability that these websites have been actually used to effect commercial transactions with customers in New York." Mere availability of the website was insufficient to establish personal jurisdiction.

Alibaba Group also argued for jurisdiction on the basis that ABBC used hosting company DigitalOcean, which is based in New York. The court said that was also not enough and pointed to Alibaba Group's failure to demonstrate that the cause of action arose out of the contact with New York. A footnote observes that whether the wallet website — the one used by holders of ABBC to buy, sell, exchange or otherwise use their cryptocurrency — is actually hosted on servers physically located in New York may also be relevant to the personal jurisdiction inquiry. The footnote raises the question: What if "the wallet software" isn't located on a server anywhere — because it is on the blockchain? In a renewed motion, we may see the plaintiffs raise this argument.

Alibaba Group similarly argued that ABBC's plans to list the coins on U.S.-based exchanges sufficed to create personal jurisdiction. But because this case involved trademark infringement, not securities laws, the provision of the Securities and Exchange Act providing for nationwide service of process didn't apply. So no dice here, either.

Additionally, the fact that ABBC used U.S. dollar value as the basis to project the value of ABBC was not enough either. As the court explained, "Personal jurisdiction in securities cases turns on national contacts but that is not the case for trademark suits."

Finally, the court held that the tortious act prong of the New York long-arm statute (applying to acts outside the state caused harm in the sate) could not be shown to have been triggered on the facts before it. Alibaba Group had not shown "a non-speculative and direct New York-based injury to its intellectual property rights."

For all of these reasons, the court dissolved its previously entered TRO and refused to enter a preliminary injunction. Thus, the Cayman plaintiff from China could not pin down the defendants who appear to exist in the ether, despite decades of prior law finding jurisdiction over domain names, websites, servers and other virtual items.

Bottom line: while the jurisdiction of U.S.-courts is expansive, it is by no means unlimited. Here, the court denied the injunction request, albeit without prejudice to refiling with an adequate jurisdictional showing. The plaintiffs may therefore have a chance to obtain discovery, supplement the record and try again.

who's who

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